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No. 86-270

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC. and DR. THOMAS F. WADDELL,
*Petitioners,*

v.

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,
*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit**

## RESPONDENT UNITED STATES OLYMPIC COMMITTEE'S BRIEF IN OPPOSITION

WALTER R. ALLEN, ESQ.
VAUGHN R. WALKER, ESQ.
JOHN J. HANSEN, ESQ.
PILLSBURY, MADISON & SUTRO
225 Bush Street
San Francisco, CA 94120

RICHARD G. KLINE, ESQ.,
*Counsel of Record*
EDWARD T. COLBERT, ESQ.
JOSEPH D. LEWIS, ESQ.
KLINE, ROMMEL & COLBERT
One Farragut Square South
Washington, D.C. 20006
(202) 393-5200

*Attorneys for Respondent*
*UNITED STATES OLYMPIC COMMITTEE*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

## STATEMENT OF PARTIES

Respondent United States Olympic Committee (hereinafter "U.S. Olympic Committee") is a non-profit, federally chartered and privately financed corporation which is recognized by the Respondent International Olympic Committee as the organization representing the United States in all matters pertaining to the Olympics. Pursuant to the Amateur Sports Act of 1978, the U.S. Olympic Committee exercises exclusive control over commercial and other defined uses of Olympic-related designations, including uses in connection with international athletic competitions, to enable it to meet its responsibility for financing the participation of the United States in the Olympic movement. See 36 U.S.C. §§ 374(3), 375(a)(3), 380.

Petitioner, Dr. Thomas F. Waddell, is a former Olympic participant who was a founder of Petitioner San Francisco Arts & Athletics, Inc. (hereinafter "SFAA"), which is, like the U.S. Olympic Committee, a non-profit corporation which conducts international athletic competitions, as well as other cultural exhibitions.

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UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,

*Respondents.*

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**On Petition For a Writ of Certiorari to The United States Court of Appeals For the Ninth Circuit**

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## RESPONDENT UNITED STATES OLYMPIC COMMITTEE'S BRIEF IN OPPOSITION

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The respondent United States Olympic Committee respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's decision in this case, reported at 781 F.2d 733 (9th Cir. 1986).

Respondent has no disagreement with the Petition's citation of the decisions below, the statement of grounds for jurisdiction of this Court or the statute involved, with the exception that § 110 of the Ama-

teur Sports Act of 1978 (36 U.S.C. § 380) was not completely set forth in the Petition. Therefore, § 380 is fully reproduced below.

## TITLE 36, UNITED STATES CODE

### § 380. Use of Olympic symbols, emblems, trademarks and names

(a) Without the consent of the Corporation [United States Olympic Committee] any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

(1) the symbol of the International Olympic Committee, consisting of 5 interlocking rings;

(2) the emblem of the Corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;

(3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or the Corporation; or

(4) the words "Olympic", "Olympiad", "Citius Altius Fortius", or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity;

shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946). However, any person who actually used the emblem in subsection (a)(2) of this section,

or the words, or any combination thereof, in subsection (a)(4) of this section for any lawful purpose prior to September 21, 1950, shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services. In addition, any person who actually used, or whose assignor actually used, any other trademark, trade name, sign, symbol, or insignia described in subsection (a)(3) and (4) of this section for any lawful purpose prior to enactment of this chapter shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services.

(b) The Corporation may authorize contributors and suppliers of goods or services to use the trade name of the Corporation as well as any trademark, symbol, insignia, or emblem of the International Olympic Committee or of the Corporation in advertising that the contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, selected, or used by the Corporation or United States Olympic or Pan-American team or team members.

(c) The Corporation shall have exclusive right to use the name "United States Olympic Committee"; the symbol described in subsection (a)(1) of this section; the emblem described in subsection (2)(2) of this section; and the words "Olympic", "Olympiad", "Citius Altius Fortius" or any combination thereof subject to the preexisting rights described in subsection (a) of this section.

## COUNTER STATEMENT OF THE CASE

The essential facts of the dispute between the parties were fully and accurately summarized by the dis-

trict court in ruling on the U.S. Olympic Committee's motion for preliminary injunction. (Petition Appendix H, A91-A127).[1]

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. The Courts Have Uniformly Held That § 380 Creates an Independent Cause of Action Which is Well Within Constitutional Constraints.

The Petition is fundamentally flawed. It is premised on a mischaracterization of the interpretation of 36 U.S.C. § 380 by a unanimous panel of the Ninth Circuit Court of Appeals, and other federal courts. Contrary to the uniform treatment given § 380 by courts throughout the land, Petitioners seek artificially to force the rights provided by § 380 into the framework of a traditional "trademark" and then attack those rights because they fail to fit that framework. Section 380 does not duplicate the trademark laws; it stands on its own.

Petitioners have not and cannot assert that there is any conflict between the Circuit Courts of Appeals. Every court to consider § 380 has treated it the same. Indeed, the Second Circuit Court of Appeals noted the consistent interpretation by "*each court to have passed on the intent of § 380,*" holding:

> It is clear that the Congressional intent in enacting § 380 was to promote the United States Olympic effort by entrusting the [U.S.

[1] The Petitioners mistakenly captioned the opinion of the District Court as an opinion of the Court of Appeals for the Ninth Circuit. The opinion was written by Chief Judge Robert F. Peckham, Northern District of California.

> Olympic Committee] with unfettered control over the commercial use of Olympic-related designations. This would facilitate the [U.S. Olympic Committee's] ability to raise those financial resources from the private sector that are needed to fund the United States Olympic Movement.

*United States Olympic Committee v. Intelicense Corporation, S.A.* 737 F.2d 263, 266 (2d Cir.), *cert. den.*, 105 S.Ct. 387 (1984).

For more than 35 years, the word "Olympic" and other Olympic-related designations have been subject to continuing protection under special provisions contained in the U.S. Olympic Committee's federal charter.[2] The 1950 statute made it unlawful for any person to use the word "Olympic" and certain other Olympic-related designations for limited purposes.[3] This former statute, which was repealed in favor of

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[2] *See*, 36 U.S.C. § 379 (1976) (repealed); 36 U.S.C. § 380 (1981). The U.S. Code also contains many sections providing special civil and criminal protection for designations used by both private and public organizations. *See, e.g.*, the civil protection provided in: 36 U.S.C. § 27 ("Boy Scouts of America"); 36 U.S.C. § 90h ("Disabled American Veterans"); 36 U.S.C. § 1086 ("Little League Baseball); and the following criminal provisions: 18 U.S.C. § 706 ("Red Cross"); 18 U.S.C. § 711 ("Smokey Bear"); 18 U.S.C. § 707 ("4-H Club"); 18 U.S.C. § 704 (military medals or designations).

[3] Those defined purposes were: "for the purpose of trade, theatrical exhibition, athletic performance, and competition or as an advertisement to induce the sale of any article whatsoever or attendance at any theatrical exhibition, athletic performance, and competition or for any business or charitable purpose. . . ." See, 36 U.S.C. § 379 (1976), 64 Stat. 901.

§ 380, imposed criminal penalties that did not require proof of any elements of the trademark laws.

In 1978, as part of a comprehensive redrafting of the U.S. Olympic Committee's charter, these criminal provisions were replaced by civil provisions which carried forward the prohibition against a limited range of uses of "Olympic."[4] "The Amateur Sports Act of 1978, P.L. 95-606, 92 Stat. 3045, created a *new*, independent cause of action, by which the U.S. Olympic Committee could protect the distinctiveness, value and marketability of its various Olympic designations." *U.S. Olympic Committee v. International Federation of Bodybuilders*, 219 U.S.P.Q. 352, 360 (D.D.C. 1982) (emphasis added). *See generally*, 2 J. McCarthy, Trademarks and Unfair Competition, (2d Ed. 1984) § 25:19 pp. 278-279.

This new cause of action provides protection for Olympic-related designations apart from the protection provided by the Federal Trademark Act.[5] Although portions of § 380 were patterned after the Federal Trademark Act,[6] there are fundamental dif-

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[4] The legislative history of § 380 is more fully set forth in the opinion below, 781 F.2d at 735, Petition at A3.

[5] In addition to asserting a § 380 claim, the complaint in this case alleged violations of the Federal Trademark Act including infringement of the U.S. Olympic Committee's registered mark "Olympic." Since the district court's summary judgment was based solely on § 380, the Trademark Act claims were not before the Ninth Circuit on appeal.

[6] Section 380 also incorporates by reference the remedial provisions of the Federal Trademark Act, but not other substantive provisions. See Petition at A64; *United States Olympic Committee v. Intelicense Corporation, S.A., supra*, 737 F.2d at 267.

ferences which preclude the blind application of trademark rules and principles to this statute.

> While [§ 380] serves some of the same purposes as the Federal Trademark Act, its direct purpose is to benefit the public by ensuring that any use of an Olympic designation is authentic.

*U.S. Olympic Committe v. International Federation of Bodybuilders, supra*, 219 U.S.P.Q. at 360. *Accord, United States Olympic Committee v. Union Sports Apparel*, 220 U.S.P.Q. 526, 529 (E.D.Va. 1983).

Congress had good reason to protect against unauthorized exploitation of "Olympic" for purposes other than simply to prevent public confusion. For example, even if use of "Olympic" were not likely to cause confusion as required by the Federal Trademark Act,[7] the U.S. Olympic Committee would still be damaged by *dilution* of the trade value of the designation. As one court noted: "The scope of protection afforded by [§ 380] is broader than trademark protection, and is more akin to that of an antidilution statute." *U.S. Olympic Committee v. International Federation of Bodybuilders, supra*, 219 U.S.P.Q. at 360. *See, generally*, 2 J. McCarthy, Trademarks and Unfair Competition, (2d Ed. 1984) § 24:13, pp. 212-223, 3A Callmann, The Law of Unfair Competition Trademarks and Monopolies (4th Ed. 1983) § 21.11, pp. 33-47.

The dilution doctrine grants protection to marks beyond the classic "likelihood of confusion" test where

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[7] Section 32 of the Trademark Act makes actionable uses of marks which are "likely to cause confusion, to cause mistake, or to deceive." 15 U.S.C. § 1114(1).

use of a mark by another dilutes the distinctive quality of the mark.[8] Implicit in Petitioners' argument is that § 32 of the Trademark Act, which requires proof of a likelihood of confusion to find infringement, reaches the constitutional limits of Congress' power to regulate trade designations. However this Court has recognized that the State may enact protections which are broader than § 32, noting, for example, that "§ 43(a) [of the Federal Trademark Act] prohibits a broader range of practices than does § 32, as may

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[8] In applying the New York anti-dilution statute, the New York Court of Appeals explained its purpose to prevent "the whittling away of any established trademark's selling power and value through its unauthorized use by others on dissimilar products."

> The evil which the Legislature sought to remedy was not public confusion caused by similar products or services sold by competitors, but a cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trademark or trade name.

*Allied Maintenance v. Allied Mechanical Trades*, 42 N.Y.2d 538, 399 N.Y.S.2d 628, 369 N.E.2d 1162 (1977). *See also, Hyatt Corp. v. Hyatt Legal Services*, 736 F.2d 1152 *cert. den.*, 105 S.Ct. 434 (1984).

Another court described this damage of dilution differently. In enjoining the use of "MASTERS" as part of the name of a golf tournament, the court recognized that:

> If the suspect name is used, there is reasonable certainty that the value of plaintiff's mark will be eroded; a little now, more later, until the "magic" of the Masters will be mortally dissipated if not completely dispelled.

*Augusta National, Inc. v. Northwestern Mutual Life Ins. Co.*, 193 U.S.P.Q. 210 (S.D. Ga. 1976). The Constitution does not prohibit protecting the value of "Olympic" any more than other trade designations which are routinely given protection by the courts.

the state unfair competition law. . . ." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 858 (1982).

By protecting against the dilution of Olympic-related designations, Congress has been able to "safeguard the [U.S. Olympic Committee's] ability to raise the financial resources that are a critical component of America's capacity to send world-class amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations." *U.S. Olympic Committee v. Intelicense Corporation, S.A., supra*, 737 F.2d at 264.

## II. The Decision Below Does Not Conflict With The Decisions of This Court or The Constitution.

### A. Neither § 380 nor its application to Petitioners violates the First Amendment

Petitioners have mischaracterized the scope of the judgment entered. The judgment in this case does not prohibit Petitioners "from using 'Olympic' in virtually any context" as contended in the Petition. (Petition at 41). Nor did the court hold "that Section 380 gave [the U.S. Olympic Committee] the power to prohibit all uses of 'Olympic' by any person, whether or not for commercial and trademark purposes. . . ." (Petition at 20-21). The judgment is quite limited, as is § 380 itself, and thus avoids constitutional infirmities.

To the extent that Petitioners wish to comment upon or to protest against the Olympics, the injunction does not prohibit them from doing so. In affirming the grant of a preliminary injunction,[9] a unanimous panel of the Ninth Circuit Court of Appeals held:

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[9] The scope of the preliminary injunction is essentially the same as the scope of the final judgment—both track the statutory language of § 380.

> The injunction accords with the provisions of 36 U.S.C. § 380 and is not overbroad. *Appellants are not enjoined from making factually correct statements which mention the Olympic Games.*

(Petition at A85, emphasis added).

In affirming the permanent injunction, a different unanimous Ninth Circuit panel showed equal sensitivity to the First Amendment considerations raised by Petitioners. Because the application of § 380 had no practical effect on Petitioners' ability to conduct their programs, and because there were satisfactory alternative means for Petitioners to express themselves,[10] the court found that the First Amendment did not entitle Petitioners to appropriate the U.S. Olympic Committee's property rights in the designation "Olympic." (Petition at A 11-13, 781 F.2d at 737).

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[10] *See, Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). Petitioners successfully conducted their competition as Gay Games I, and recently concluded Gay Games II. As the Second Circuit Court of Appeals held in a trademark case:

> Because there are numerous ways in which defendants may comment on "sexuality in athletics" without infringing plaintiff's trademark, the district court did not encroach upon their first amendment rights in granting a preliminary injunction. • • •
>
> "• • • This is not a case of government censorship, but a private plaintiff's attempt to protect its property rights. The propriety of a preliminary injunction where such relief is sought is so clear that courts have often issued an injunction without even mentioning the first amendment."

*Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204 (2d Cir. 1979).

The U.S. Olympic Committee has never suggested that § 380 prohibits *all uses* of "Olympic." This has been recognized by the courts which have enforced § 380. As Chief Judge Peckham wrote:

> We have already explained, however, that Section 380 does not establish a per se rule against the use of Olympic words and symbols but only grants the [U.S. Olympic Committee] their exclusive use within "a range of uses."

(Petition at A122, 219 U.S.P.Q. at 987).

Despite Petitioners' cry that § 380 gives the U.S. Olympic Committee the "power to control the nation's political vocabulary" (Petition at 25), the statute is limited to uses of Olympic "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition." When one court found that "Olympic" was being used for political speech, it held that such use was not prohibited by § 380 because it was outside this "range of uses" prohibited by the statute. *Stop the Olympic Prison v. U.S. Olympic Committee*, 489 F. Supp. 112 (S.D.N.Y. 1980).[11]

In contrast, Petitioners used "Olympic" to draw attention to their own international athletic compe-

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[11] Contrary to Petitioners' statement, Petition at 11, the *Stop the Olympic Prison* case was not brought by the U.S. Olympic Committee, but was a declaratory judgment brought *against* the U.S. Olympic Committee. Consequently, the plaintiff in that case was not a litigative target as claimed by Petitioners.

Also contrary to Petitioners' contention, the courts below did not ignore that case. Rather, it was cited with approval to show the limitations of the scope of § 380.

tition—deliberately patterned after the Olympic Games conducted by Respondents. Like the U.S. Olympic Committee, Petitioners used "Olympic" on fund-raising items, such as T-shirts, posters and buttons. Petitioners seek to use "Olympic" within the defined range of uses proscribed by Congress. The value in so using "Olympic" was created by the efforts of Respondents and the enormous success of the modern Olympic Games. Petitioners seek a free ride on the goodwill created by Respondents, cloaking their short-cut to popularity in the First Amendment.

Petitioners argue that because their use of Olympic is not for profit, they have a greater right to use "Olympic." SFAA's status as a nonprofit corporation does not remove its activities from trade, or make otherwise commercial activities non-commercial. *American Medial Association v. United States*, 130 F.2d 233, 237, *aff'd*, 317 U.S. 519 (1943) ("It is not necessary, in order to constitute trade or business, that it shall be carried on for profit.") Indeed, the U.S. Olympic Committee is itself a non-profit organization, 36 U.S.C. § 378, and it would be anomalous to find that it could not protect its rights against other such organizations.

Petitioners urge that the First Amendment requires this Court to read into § 380, the provision of the Federal Trademark Act that deems non-infringing, the "use, *otherwise than as a trade or service mark* . . . of a term or device which is descriptive of and used fairly and in good faith *only to describe* to users the goods or services. . . ." 15 U.S.C. § 1115(b)(4) (emphasis added). However, this provision is inapplicable to § 380 which contains no such language. Section § 380 is, instead, self-limited in its application to a

defined range of uses set forth in the statute. The defense is also unavailable since Petitioners' use of "Olympic" was use as a trademark, not use in a descriptive fashion.[12] It was used as "a symbol that attracts public attention". *Beer Nuts, Inc. v. Clover Club Foods Co.*, 711 F.2d 934 (9th Cir. 1983).

Although injunctive relief is usually granted in trademark, copyright and other similar cases, Petitioners argue that the injunction is overbroad because they offered to include a disclaimer with their use of Olympic. (Petition at 44-46). However, as this Court has observed, the Constitution does not require that such disclaimers be permitted: "there is no First Amendment rule . . . requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication." *Friedman v. Rogers*, 440 U.S. 1, 12, at n.11 (1979).

As the court found in this case,

> use of a disclaimer would undermine the purpose of the Amateur Sports Act of 1978 and, in effect, [would] countenance allowing any infringer, however objectionable, to use "Olympic," as long as it expressly [disavowed] any connection with the [U.S. Olympic Committee].

(Petition at A65-66).

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[12] Petitioners used "Olympic" as a dominant part of the name of their international athletic competition, and prominently featured "Olympic" on fund-raising and promotional materials.

**B. The U.S. Olympic Committee is Not Engaged in State Action.**

Petitioners First Amendment and equal protection Constitutional claims are premised on the erroneous supposition that the U.S. Olympic Committee's enforcement of § 380 is "State action." (Petition at 36). This Court has clearly held that to make private activity "State action," the level of governmental involvement in the private activity must be substantial, and that in order to fall within the ambit of the constitutional prohibition against discrimination, the State must have significantly involved itself with invidious discrimination. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).

The U.S. Olympic Committee "exists and operates independently of the Federal government." *DeFrantz v. U.S. Olympic Committee*, 492 F.Supp. 1181, 1193 (D.D.C.) *aff'd per curiam*, 701 F.2d 2216 (D.C. Cir. 1980). In *DeFrantz*, the complained of action was a vote by the U.S. Olympic Committee not to send athletes to the 1980 Summer Olympics in Moscow. In reaching its holding, the court fully addressed the tests of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Even though the vote was taken at the specific request of the President and Vice-President of the United States as well as in response to Congressional resolutions, the court held that there was no State action. Clearly, if State action was not present in that extreme case, it is not present here.

*Martin v. International Olympic Committee*, 740 F.2d 670 (9th Cir. 1984), cited by Petitioners, involved a high degree of cooperation and coordination between the city of Los Angeles and the independent local organizing committee which conducted the 1984

Summer Olympics. In that case, the court held that the local committee's conduct constituted State action. None of the facts critical to that decision are present in this case. The U.S. Olympic Committee acted independently of any governmental involvement.

If the U.S. Olympic Committee's enforcement of its rights were to be held to be State action merely by virtue of having sought relief in federal court, then enforcement of other statutes giving similar property rights to private parties would also be State action. Thus enforcement of the Trademark Act and the Copyright Act would be unconstitutional because they also empower private parties to assert their rights against defendants they choose. Enforcement of such private rights does not constitute State action or raise a constitutional question.

## CONCLUSION

For the foregoing reasons, this case does not present any constitutional questions appropriate for review by this Court and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

UNITED STATES OLYMPIC COMMITTEE

BY RICHARD G. KLINE,
*Counsel of Record*
EDWARD T. COLBERT
JOSEPH D. LEWIS
KLINE, ROMMEL & COLBERT
One Farragut Square South
7th Floor
Washington, D.C. 20006
Telephone: (202) 393-5200

WALTER R. ALLEN
VAUGHN R. WALKER
JOHN J. HANSEN
PILLSBURY, MADISON & SUTRO
225 Bush Street
San Francisco, CA 94120
Telephone: (415) 983-1000

*Attorneys for Respondent*
*UNITED STATES OLYMPIC COMMITTEE*